

IN THE  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
IN AND FOR THE  
**NINTH CIRCUIT**

GEORGE M. STOUT, State Liquor Administrator of the State of California,  
and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

*Appellants,*

VS.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

*Appellee.*

**APPELLANTS' OPENING BRIEF**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Northern Division

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State of California,  
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## SUBJECT INDEX

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	Page
I. PRELIMINARY STATEMENT .....	1-2
II. STATEMENT AS TO JURISDICTION OF THE CASE .....	2-6
III. PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS .....	7-12
IV. QUESTIONS PRESENTED BY THE APPEAL....	12-13
V. STATEMENTS OF POINTS AND SPECIFICATIONS OF ERRORS RELIED UPON.....	13-14
VI. ARGUMENT .....	14-18
A. Categorical .....	14-18
1. The State Law Controls Alcoholic Beverages and Their Incidents .....	14-15
2. Appellee Should Have Been Required to Pay the License Fee.....	15-16
3. Appellee Should Have Been Required to Procure a Still License.....	16
4. The Still Has Been Forfeited to the State....	16-17
5. The Still Was Forfeited to the State Before the Declaration of Bankruptcy.....	17-18
B. The Injunction Should Not Have Been Granted..	18-19
C. Leave to Enforce the Forfeiture Should Have Been Granted .....	19-20
CONCLUSION .....	21-22

## INDEX TO CASES AND AUTHORITIES

### CASES

	Page
Ashton v. Cameron County etc. District, 298 U. S. 513, 530, 531; 56 Sup. Ct. 892_____	14
Boteler v. Ingels (9th Cir.), 307 U. S. 617; 59 Sup. Ct. 792__	16
Fitz v. McGhee, 172 U. S. 516; 19 Sup. Ct. 269_____	18
Gillis v. California, 293 U. S. 62; 55 Sup. Ct. 4_____	16
In re Bay Ridge Inn, 94 Fed. (2d) 555, at 556-7_____	17
In re Manhattan Hofbrau Haus, 19 Fed. Supp. 896_____	17
In re Mid America Company, 31 Fed. Supp. 601_____	15
Mahoney v. Jos. Triner Corp., 304 U. S. 401; 58 Sup. Ct. 952	15
Mitchell v. Lay, 48 Fed. (2d) 79 (9th Cir.); certiorari de- nied, 283 U. S. 864_____	17
Moss & Co. v. McCarthy, 191 Fed. 202_____	8
Niccoli v. McClelland, 21 Cal. App. (2d) 759; 65 Pac. (2d) 853 _____	17
People v. One 1933 Plymouth, 13 Cal. (2d) 565; 90 Pac. (2d) 799 _____	17
Preble Corp. v. Wentworth, 84 Fed. (2d) 73; certiorari de- nied, 299 U. S. 575_____	16
Premier-Pabst Sales Co. v. State Board of Equalization, 13 Fed. Supp. 90, 93-94_____	15
State Board of Equalization v. Young's Market Co., 299 U. S. 59; 57 Sup. Ct. 77_____	15
Speilman etc. Co. v. Dodge, 295 U. S. 89, 95; 55 Sup. Ct. 678_	18
Swarts v. Hammer, 194 U. S. 441, 444; 24 Sup Ct. 695_____	17
Terrace v. Thompson, 263 U. S. 197, 214; 44 Sup. Ct. 15_____	18
Texas v. Donoghue, 302 U. S. 284; 58 Sup. Ct. 192_____	19, 20
The Antelope, 10 Wheat. 66, 68; 6 L. Ed. 268_____	18
Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377; 220 Pac. 306 _____	17
United States v. Butler, 297 U. S. 1; 56 Sup. Ct. 312_____	14
United States v. Stowell, 133 U. S. 1; 10 Sup. Ct. 244_____	17
Wallace v. Ford, 21 Fed. Supp. 624_____	18
Wiley v. State Board of Equalization, 21 Fed. Supp. 604_____	15
Ziffrin, Inc. v. Reeves, 308 U. S. 132; 60 Sup. Ct. 163_____	14, 15

## INDEX TO CASES AND AUTHORITIES—Continued

### AUTHORITIES

	Page
Alcoholic Beverage Control Act of the State of California—	
(Statutes 1935, p. 1123, as amended) -----	2, 8
(Statutes 1937, pp. 1934 and 2126) -----	8
Section 1 -----	3, 8
2 -----	3, 8
3 -----	3, 9
5 -----	9
5, subdiv. 6 and 7 -----	10
6, subdiv. (a) -----	10
51a -----	4, 10
51b -----	4, 10
51c -----	4
51d -----	4, 11
52 -----	4, 11
Bankruptcy Act—	
Section 24 -----	6
322 -----	2, 18
California Constitution, Article XX, section 22 -----	3, 7
Chandler Act of June 22, 1938 -----	6
Deering's General Laws, Act 3796 -----	8
Judicial Code—	
Section 65 -----	6
128 -----	6
129 -----	6
48 Stat. 993 -----	6
United States Code Annotated—	
Title 11, section 47 -----	6
28          124 -----	6, 11, 16
124a -----	6, 11, 16
223 -----	6
227 -----	6
United States Constitution—	
Article IV, section 2 -----	15
Fourteenth Article of Amendment -----	15
Twenty-first Article of Amendment -----	7



No. 10068

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*Appellants,*

vs.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

*Appellee.*

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APPELLANTS' OPENING BRIEF

I

PRELIMINARY STATEMENT

This appeal is from a judgment of the District Court of the United States upon review of certain orders of a referee in bankruptcy of said court enjoining appellants, as State law enforcement officers, from enforcing the provisions of the Alcoholic Beverage Control Act of the State of Cali-



fornia (Statutes 1935, page 1123, as amended), and denying leave to appellants to prosecute an action in the courts of the State of California to confirm a statutory forfeiture of certain distillery equipment; in which the court adopted the findings of the referee as presented to the court in the Referee's Certificate and Report; refused to reverse said orders of the Referee; denied appellants' prayer for relief; and affirmed the orders of the referee; and further enjoined the State Board of Equalization of the State of California (though not a party to the proceedings) from in any manner enforcing or attempting to enforce said Alcoholic Beverage Control Act against the estate of the bankrupt or against appellee, its trustee.

## II

### STATEMENT AS TO JURISDICTION AND OF THE CASE

Since the facts of the case are relatively simple, a single statement will suffice for a determination of jurisdiction of this court and for a statement of the case. (References are to the printed transcript.)

On or about the 12th day of August, 1939, George Hugo Malter filed a debtor's petition under section 322 of the Bankruptcy Act, and proceedings thereunder were referred to Samuel F. Hollins, one of the referees in bankruptcy of said District Court; thereafter, and on or about the 18th day of November, 1939, the said debtor was duly adjudicated a



bankrupt, and on the 22nd day of November, 1939, Bert M. Green, the appellee, was duly appointed trustee of the bankrupt's estate and effects; appellee has been ever since and still is the trustee of said estate (Tr., p. 3); appellee took possession of the assets of said bankrupt, consisting of approximately five (5) acres of land, and equipment designed for the manufacture of brandy from grapes, including an alcoholic beverage still and its appurtenances (Tr., p. 22).

The law of the State of California has at all times material to this proceeding licensed the alcoholic beverage industry and prohibited the unlicensed possession of alcoholic beverage stills (Alcoholic Beverage Control Act, sections 2, 3,), and said statute is an exercise of the police power of the state (Alcoholic Beverage Control Act, section 1).

Appellants sought to induce appellee to secure a license for said distilling equipment as required by said Act, but appellee refused to apply for such license (Tr., pp. 32 and 35).

Since the 30th day of June, 1939, when the bankrupt's license terminated (Tr. 28), said still has not been licensed to any person by the State Board of Equalization of the State of California, the licensing agency, having charge of licensing such stills (California Constitution, Article XX, section 22); appellee does not now and has not at any time hold any license or permit of the said

State Board of Equalization, or of any other officer of the State of California, permitting him to possess said still; said still has been at all times located within the State of California (Tr., p. 22); the Alcoholic Beverage Control Act further provides that said still and other material forfeited to the State of California by virtue of such unlicensed possession (sections 51a, 51b, 51c, 51d and 52).

Appellants are, respectively, the State Liquor Administrator of the State of California and Chief Liquor Control Officer of the area of said state in which said still is and has been located, and are charged with the duty of seizing stills and other property forfeited to the State of California by virtue of said Act. Specifically, it is the duty of appellants to seize and take possession of said still pursuant to said Act, and to cause the commencement of an action in the appropriate courts of the State of California for the confirmation of said forfeiture; appellants, acting in their official capacities, sought to enforce said Alcoholic Beverage Control Act of the State of California with respect to said still in the possession and control of appellee (Tr., p. 45); the referee in said bankruptcy proceeding, on the 18th day of April, 1940, made his certain restraining order and order to show cause of that date, enjoining and restraining appellants and any and all persons acting for or with them from enforcing the Alcoholic Beverage Control Act with

respect to said still, said trustee and said estate (Tr., pp. 6-8), based upon appellee's petition for such order (Tr., pp. 2-6); thereafter appellants moved to dismiss the proceeding respecting said restraining order and order to show cause (Tr., p. 9), and on or about the 26th day of October, 1940, said referee made his order denying the motion to dismiss and continuing said restraining order in effect until the merits of the petition for said restraining order be determined (Tr., pp. 10-12); thereafter appellants filed their answer and petition for leave to enforce the Alcoholic Beverage Control Act with respect to said still and for the delivery of said still, for the purpose of commencing a forfeiture proceeding pursuant to the laws of the State of California (Tr., pp. 71-75); appellee answered said petition (Tr., pp. 76-78), and a hearing was had on the merits of said petitions and answers and a certain stipulation of facts and testimony offered (Tr., pp. 27-30).

The testimony was that appellee was of good character and reputation (Tr., p. 37), but had possessed, without a license, a similar still as a trustee in another bankruptcy proceeding, and appellants had demanded that he secure a license for such still (Tr., pp. 35-36); that he had not operated nor intended to operate either still, and that his attorney advised him that the state law did not require a license; that although he was an attorney he accepted this advice and made no application until

December 11, 1940, when he did apply for a license (Tr., pp. 36-37).

Following said hearing said referee made his order on said petitions (Tr., pp. 31-33), denying any relief to appellants and ordering that the prayer of the trustee's petition be granted and the temporary restraining order heretofore referred to be continued "until action is taken by the State Board of Equalization upon the application of the trustee for license" (Tr., pp. 79-81); thereafter appellants petitioned the District Court for a review of said proceedings and order of the referee, which review was allowed, and upon a hearing the order appealed from was made on November 22, 1941 (Tr., pp. 88-89).

The jurisdiction of this court to review the judgment of the United States District Court is based upon section 24 of the Bankruptcy Act, 11 U. S. C. A., sec. 47 as revised and amended by the Chandler Act of June 22, 1938, Judicial Code, sec. 65, (28 U. S. C. A., sec. 124); 48 Stat. 993, (28 U. S. C. A., sec. 124a); Judicial Code, section 128, (28 U. S. C. A., sec. 223); Judicial Code, section 129, (28 U. S. C. A., sec. 227), Notice of Appeal duly filed (Tr., pp. 90-91), Designation of the Portions of the Record, Proceedings and Evidence Contained in the Record on Appeal (Tr., pp. 93-95), and Order of Circuit Court of Appeals allowing appeal made and filed herein.



### III

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Twenty-first Article of Amendment to the Constitution of the United States provides in part:

“The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited.”

The People of the State of California, following the adoption of the foregoing Article of Amendment to the Constitution of the United States, adopted section 22 of Article XX of the Constitution of that state, reading in part:

“The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor. \* \* \* The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this state \* \* \* It shall be unlawful for any person other than a licensee of said board to manu-

facture, import or sell intoxicating liquors in this state \* \* \*.”

Pursuant to the provisions of this amendment, the Legislature of the State of California adopted the Alcoholic Beverage Control Act (Statutes 1935, p. 1123, as amended by Statutes 1937, pp. 1934 and 2126; Deering’s General Laws, Act 3796), the pertinent provisions of which follow:

Section 1 of the Act provides in part:

“This act shall be deemed an exercise of the police powers of the State, for the protection of the safety, welfare, health, peace and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages; and it is hereby declared that the subject matter of this act involves in the highest degree the economic, social and moral well-being and the safety of the State and of all its people; and all provisions of this act shall be liberally construed for the accomplishments of these purposes. \* \* \*”

Section 2 of the Act provides in part:

“The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning: \* \* \*

(f) ‘Person’ includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination



acting as a unit, and the plural as well as the singular number. \* \* \*

(w) 'Within this State' means all territory within the boundaries of this State. \* \* \*

(x) 'Still' means a still used in the production or capable of being used in the production of alcoholic beverages and does not include stills or apparatus used solely in the production of distilled water or substances other than alcoholic beverages. \* \* \*

(z1) 'Licensee' means any person holding a license issued by the board. \* \* \*"

Section 3 of said Act provides:

"No person shall exercise the privilege or perform any act or acts which a licensee under this act may exercise or perform under the authority of a license issued under this act unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act. Any person violating any provision of this section shall be guilty of a misdemeanor, except that any person exercising the privileges or performing any act or acts which a still licensee may exercise or perform without having a still license duly issued under this act to said person is guilty of a felony."

Section 5 of said Act provides in part:

"The following are the types of licenses to be issued under this act and the annual fees to be charged therefor. \* \* \*

4. Still license----\$10.00 per year per still."

Section 6 of said Act provides in part:

“Except as otherwise provided in this act and subject to the provisions of section 22 of Article XX of the Constitution, the licenses provided for in the preceding section shall authorize the person to whom issued to exercise the following rights and privileges and no others at the premises for which issued during the year for which issued. \* \* \*

(b) A still license authorizes the person to whom issued to own or possess the number of stills indicated in the license upon the premises for which issued \* \* \*”

A still license does not permit the operation of the still. An additional license, as a brandy manufacturer's license or distilled spirits manufacturer's license, is required for such operation.

See section 5, subdivisions 6 and 7, and section 6, subdivision (a).

Section 51a of said Act reads:

“The board or its employees shall also have the power to seize any unlicensed still, whether in actual operation or not, and whether assembled for operation or dismantled, and also any parts of such stills, and also any materials or supplies capable of being used for the manufacture of alcoholic beverages which are found on or about the premises where any such unlicensed still or parts thereof are found.”

Section 51b of said Act reads:

“When alcoholic beverages or any other property are seized under the provisions of this act

such alcoholic beverages or other property shall be forfeited to the State and all such forfeitures are hereby declared to be statutory forfeitures.”

Sections 51d and 52 of the Act provide a detailed procedure for a judicial proceeding to confirm the Statutory forfeiture declared in the foregoing provisions of said Act.

Statutes of the United States bearing upon this question are section 124a, Title 28, U. S. C. A., reading:

“Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation. *Provided, however,* That nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power of the State or States, or by the civil subdivisions of the State or States imposing the same.”

—and section 124, Title 28, U. S. C. A., reading:

“Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such

receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than \$3,000, or imprisoned not more than one year, or both.”

#### IV

#### QUESTIONS PRESENTED BY THE APPEAL

1. Has a referee in bankruptcy jurisdiction to restrain State law enforcement officers from enforcing a penal statute of the State with respect to a bankruptcy trustee and property in his possession as such trustee?

2. Has a referee in bankruptcy jurisdiction:

(a) To authorize a trustee in bankruptcy to disobey the state statutes in two respects, first, the nonpayment of taxes and license fees, and secondly, to refuse to comply with a valid police regulation of the state requiring a license in order to possess an alcoholic beverage still;

(b) To enjoin the commencement or the prosecution of criminal actions against the trustee for a violation of the state law;

(c) To protect the trustee in the continuing possession of contraband under the state law;

(d) To give injunctive relief against strangers to the proceeding upon an affidavit or so-called



petition and order to show cause without process in the bankruptcy proceeding?

3. Do the petition, order to show cause and stipulation on which the restraining orders were made by the referee in bankruptcy state a cause of action for (a) any relief, and (b) the particular relief granted by the referee?

4. Should such state enforcement officers be granted leave to confirm and enforce in the State courts a statutory forfeiture of property formerly belonging to the bankrupt and in the hands of such trustee?

## V

### STATEMENTS OF POINTS AND SPECIFICATIONS OF ERRORS RELIED UPON

1. The District Court and its said referee in bankruptcy erred in issuing said restraining orders and injunctions, and each of them, upon the subject-matter of the purported cause of action set forth in said petition of said trustee.

2. The District Court and its said referee erred in denying appellants' motion to dismiss this proceeding.

3. The District Court and its said referee, and each of them, erred in attempting to exercise jurisdiction over the persons of appellants in their respective official capacities.

4. The District Court and its said referee erred in denying leave to appellants to confirm and enforce the forfeiture incurred by appellee's unlawful possession of said alcoholic beverage still.

## VI

### ARGUMENT

#### A. Categorical

##### 1. The State Law Controls Alcoholic Beverages and their Incidents

The essential question presented by this appeal is whether the statutes respecting alcoholic beverages adopted in the exercise of the police power of the State of California may be enforced against a trustee in bankruptcy and the assets of the bankrupt's estate in his possession otherwise subject to the state statutes.

It is the general rule that the state police power may be exercised with respect to matters subject to the jurisdiction of the United States. The state law in such case prevails.

*Ashton v. Cameron County etc. District*, 298

U. S. 513, 530, 531; 56 Sup. Ct. 892;

*United States v. Butler*, 297 U. S. 1; 56 Sup. Ct. 312;

*Ziffirin, Inc. v. Reeves*, 308 U. S. 132; 60 Sup. Ct. 163.

With respect to alcoholic beverages and their incidents, the power of the individual states to legislate and enforce legislation is unlimited. Such



statutes override the specific provisions of the Constitution of the United States.

*State Board of Equalization v. Young's Market Co.*, 299 U. S. 59; 57 Sup. Ct. 77;

*Ziffrin, Inc. v. Reeves, supra.*

(Interstate commerce and the Fourteenth Amendment.)

*Wiley v. State Board of Equalization*, 21 Fed. Supp. 604.

(The privileges and immunities clause of Article IV, section 2.)

Such state statutes need not be reasonably necessary to control the liquor traffic in the state.

*Mahoney v. Jos. Triner Corp.*, 304 U. S. 401; 58 Sup. Ct. 952.

See, also:

*Premier-Pabst Sales Co. v. State Board of Equalization*, 13 Fed. Supp. 90, 93-94.

## **2. Appellee should have been Required to Pay the License Fee**

Pursuant to sections 2 and 5 of the Act, which we have set out *supra*, every "estate, trust \* \* \* receiver" and other person is required to pay the ten dollar license fee for each still possessed. The fees required by this Act have been held to be taxes.

*State Board of Equalization v. Young's Market Co., supra.*

See, also:

*In re Mid-America Company*, 31 Fed. Supp. 601.

The officers of the Federal courts are required to pay such fees by the provisions of section 124a, Title 28, U. S. C. A., *supra*.

*Boteler v. Ingels* (9th Cir.), 307 U. S. 617;  
59 Sup. Ct. 792;

*Preble Corp. v. Wentworth*, 84 Fed. (2nd) 73;  
denied certiorari, 299 U. S. 575.

### **3. Appellee Should Have Been Required to Procure a Still License**

It is not necessary to consider whether in any event the Federal courts may authorize their officers to violate state laws enacted in the exercise of state police power, because it has been held that Congress expressly withheld any such power from the courts of the United States by the passage of section 124, Title 28, U. S. C. A.

*Gillis v. California*, 293 U. S. 62; 55 Sup. Ct. 4.

See, also:

*Boteler v. Ingels*, *supra*;

*In re Mid-America Company*, *supra*.

Appellee was required to procure a license in order to possess the distilling equipment received from the bankrupt.

### **4. The Still Has Been Forfeited to the State**

Upon the refusal of appellee to promptly register the instant still and procure a license permitting him to possess the same, the still became (if it had not already become) forfeit to the State of California by operation of law.

*Traffic Truck Sales Co. v. Justice's Court*, 192 Cal. 377; 220 Pac. 306;  
*Niccoli v. McClelland*, 21 Cal. App. (2d) 759; 65 Pac. (2d) 853;  
*People v. One 1933 Plymouth*, 13 Cal. (2d) 565; 90 Pac. (2d) 799;  
*United States v. Stowell*, 133 U. S. 1; 10 Sup. Ct. 244.

The mere fact that appellee was a trustee in a bankruptcy proceeding does not require a different rule. The rights of a trustee in bankruptcy with respect to alcoholic beverages and equipment for their manufacture are governed by the state law.

See cases cited *supra* and

*In re Manhattan Hofbrau Haus*, 19 Fed. Supp. 896;  
*In re Bay Ridge Inn*, 94 Fed. (2d) 555, at 556-7;  
*Swarts v. Hammer*, 194 U. S. 441, 444; 24. Sup. Ct. 695.

The same rule applies to other businesses subject to regulation.

*Mitchell v. Lay*, 48 Fed. (2d) 79 (9th Cir.); certiorari denied, 283 U. S.. 864.

##### **5. The Still was Forfeited to the State before the Declaration of Bankruptcy**

As clearly appears from the statement of facts, the bankrupt's license to possess the instant still terminated on the 30th day of June, 1939, and the bankrupt failed to renew his license or to procure another license to permit the possession of his dis-

tillery equipment. It was not until the 12th day of August, 1939 that the bankrupt filed a debtor's petition under section 322 of the Bankruptcy Act, and he was not adjudicated a bankrupt until the 18th day of November, 1939. Consequently, the still was unlawfully possessed by the bankrupt before the bankruptcy courts acquired jurisdiction of either the bankrupt or his estate, and was thereby forfeited to the state.

See cases cited *supra*.

Upon his unlicensed possession the still forfeited to the state and should have been delivered to the state for the purposes of confirming such forfeiture.

## **B. The Injunction Should Not Have Been Granted**

The courts of the United States should not enjoin the commencement and prosecution of criminal proceedings in the state courts for violations of the penal statutes of the state.

*The Antelope*, 10 Wheat. 66, 68; 6 L. Ed. 268;

*Terrace v. Thompson*, 263 U. S. 197, 214; 44 Sup. Ct. 15;

*Fitz v. McGhee*, 172 U. S. 516; 19 Sup. Ct. 269;

*Moss & Co. v. McCarthy*, 191 Fed. 202;

*Wallace v. Ford*, 21 Fed. Supp. 624.

One of the principal reasons for denying injunctive relief in such cases is that the person seeking the injunction has an adequate remedy at law.

*Speilman etc. Co. v. Dodge*, 295 U. S. 89, 95; 55 Sup. Ct. 678.



In this case the trustee should have been required to comply with the state law or to establish that it did not apply to him in a criminal proceeding in the state courts, and it was error on the part of the referee and the court to enjoin the appellants, as persons charged with the enforcement of the state law, from performing their constitutional and statutory duties.

*Speilman etc. Co. v. Dodge, Supra.*

The court erred also in enjoining the enforcement of the Act with respect to the still and other property forfeited to the state.

See:

*Texas v. Donoghue*, 302 U. S. 284; 58 Sup. Ct. 192;

*Mitchell v. Lay*, *supra*;

*Ziffrin, Inc. v. Reeves*, *supra*.

### **C. Leave to Enforce the Forfeiture Should Have Been Granted**

The contraband distillery equipment in this case had forfeited to the State of California because of its unlawful possession by the bankrupt and, subsequently, by the trustee (appellee), prior to the time appellants requested leave of the referee in bankruptcy to proceed to a confirmation of said forfeiture. The referee and the court erred in denying appellants' petition.

This was the holding in the case of *Texas v. Donoghue*, *supra*, where the same issue was pre-

sented in the case of contraband oil produced and transported in violation of the state statute. Since the question presented is identical, we take the liberty of quoting from the opinion (pp. 286, 288, 289):

“There is before us no question as to the validity of the State’s measures to regulate production, or as to when, if ever, the oil in controversy became forfeit. The sole issue is whether the bankruptcy court should have permitted the State to bring suit in a state court to have the oil adjudged confiscate. \* \* \*

The State’s insistence is not that it is presently entitled to establish a right to forfeit the oil, but that the oil became its property when produced or transported contrary to law. It seeks not to forfeit but to enforce the forfeiture that resulted, as it maintains, immediately from unlawful production or transportation. \* \* \*

The filing of the petition for reorganization in the bankruptcy court may not be held to deprive the State of opportunity in its own court to establish its claim that through forfeiture it had already become the owner of the oil for that would be to take the State’s property for the benefit of the offending company or its creditors. Nor may the receivers’ voluntary surrender of possession to the debtor’s trustee prevent adjudication of the State’s claim. The bankruptcy court abused its discretion in denying the State’s application for permission to institute proceedings in the state court and, to the extent that the Circuit Court of Appeals sustained that ruling, its judgment must be *Reversed*.”



## CONCLUSION

The proceedings herein, the orders of the referee and the order of the court affirming these orders as modified violate every principle of law and policy of this nation, and completely deny to the state, through appellant officers, its right to enforce its policy and law with respect to a subject universally recognized as calling for strict regulation. It is obviously the purpose of the statutes of the state to require the registration and licensing of every distilled spirits still in the state.

The statute makes it clear that the purpose of its provisions respecting distilled spirits stills and equipment is to authorize possession alone. An additional license is required before the stills may be used and operated.

If stills may be readily possessed by anyone under any circumstances without registration and license, then it will be difficult if not impossible to adequately enforce the state law.

We respectfully submit that it is obvious that the policy of this state does not contravene any policy or law of the United States, and that the appellee in this case was subject to the provisions of the Alcoholic Beverage Control Act of the State of California.

Appellee should not have been protected in his refusal to comply with the state law by the improper injunction and restraining order issued by the referee and subsequently affirmed by the court.

Furthermore, the court should have permitted the enforcement of the forfeiture which had occurred by reason of appellee's failure and refusal to comply with the state law.

We respectfully submit that the judgment of the court should be reversed, with directions to the court below to grant leave to appellants to proceed as they may be advised in the enforcement of the penal and forfeiture provisions of the Alcoholic Beverage Control Act of the State of California.

Respectfully submitted,

DATED: April 30, 1942

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